No. 83-324

In the Supreme Court of the United States

OCTOBER TERM, 1983

MICHAEL CONSTRUCTION COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DAVID L. SLATE
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

Whether the court of appeals correctly held that the Equal Employment Opportunity Commission's administrative subpoena should be enforced because the EEOC acted on a sufficient charge and it was not improper for the EEOC to be motivated in part by a desire to settle the charge.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-324

MICHAEL CONSTRUCTION COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 706 F.2d 244. The opinion of the district court (Pet. App. A17-A40) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1983 (Pet. App. A1-A16). A petition for rehearing was denied on June 1, 1983 (Pet. App. A49). The petition for a writ of certiorari was filed on Aug. 25, 1983. The jursidiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an action brought by the Equal Employment Opportunity Commission to enforce a subpoena issued pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-8 and 2000e-9. The subpoena was issued in the investigation of a charge of racial discrimination filed by

Roy Jackson against petitioner, Michael Construction Company. The EEOC sent petitioner notice of the charge with a copy of the charge attached. The charge stated (Pet. App. A2):

> I was hired about 1-2-80. I was discharged on 2-11-80.
>
> When I reported to work on 2-11-80 Patricia Robinson, the secretary, told me I had to see Glen Robinson, the project engineer, or Paul LNU (last name unknown), the superintendent.
>
> I believe that this is race discrimination because:
>
> 1. For five days I reported to work and just got the run around. They weren't around to find.
>
> 2. I was absent on Feb. 6, 7, and 8, but I called in on 2-7-80.
>
> 3. The company told the unemployment office that I was absent two weeks, as of 2-6-80.

Petitioner responded with a letter and four statements signed by company personnel. These indicated that Jackson had been replaced on February 13, 1980, because he was assumed to have quit when he was absent on February 6 and the following days (Pet. App. A25). The Commission scheduled a factfinding conference and requested that officials of petitioner attend. It also sent petitioner a "Discharge/General Questionnaire" requesting information about Jackson's discharge and company disciplinary policies and records since January 1, 1980 (*id.* at A3).

Shortly thereafter, Bama N. Gardner, the equal employment opportunity specialist assigned to process Jackson's charge, spoke with a representative of petitioner concerning the charge and explored the possibility of negotiating a settlement. She informed petitioner that Jackson desired

reinstatement and back pay.[1] Petitioner indicated that it was not interested in a settlement and refused to supply any of the requested information, asserting that the charge failed to allege facts indicating racial discrimination (Pet. App. A3, A27). Petitioner [illegible] any additional information the EEOC had [illegible] *id.* at A28).

Petitioner failed to attend [illegible] conference. Jackson, who attended, [illegible] white employee had been absent under similar circumstances but had not been discharged (Pet. App. A3). Thereafter, the EEOC again requested information from petitioner but narrowed the period of time for which information was sought. After petitioner again refused to supply any information, the Commission issued a subpoena duces tecum for the information. Petitioner's request for revocation of the subpoena was denied by the EEOC district director, and this enforcement action was brought. *Ibid.*

2. The district court, after a hearing, declined to enforce the subpoena. It concluded that the underlying charge and notice were inadequate as a matter of law because they failed to state the circumstances of the alleged discrimination with sufficient specificity (Pet. App. A24, A33). The court also found that "the sending of the questionnaire and the scheduling of the conference and the pursuing of the discovery process was, at least, partially intended to bring about a monetary settlement in the case on behalf of Mr. Jackson * * *" (*id.* at A29). The court held that these motives were improper and denied enforcement of the subpoena on that ground as well (*id.* at A24, A30). At the conclusion of the hearing, the district court awarded $9,399.01 in attorney's fees to the company as the prevailing

---

[1]Gardner stated that she did not see merit in the charge but that her personal view was not the issue (Pet. App. A4, A26).

party pursuant to Section 706(k) of Title VII, 42 U.S.C. 2000e-5(k) (see Pet. App. A47-A48). The court stated (*id.* at A33):

> Now I certainly don't think [the action] was brought in subjective bad faith. If you look at what's in the file of the Commission, you would not say that it was frivolous. It would await some determination as to its validity perhaps, but the Commission, I think, clearly proceeded in an unreasonable way and without foundation. They proceeded upon a charge that did not meet the statutory requirements. The respondent had no obligation to respond to a charge that did not meet the statutory requirements. It then used the procedures in an attempt to bring the * * * company to a decision to pay Mr. Jackson some amount, albeit nominal, to get rid of the case.

3. The court of appeals reversed. It first held that the charge and notice met the requirements of Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b), and Commission regulations (Pet. App. A5-A10). Turning to the issue of the Commission's good faith, the court upheld as not clearly erroneous the lower court's finding that the Commission had pursued the investigation in part with the intent to settle the case (*id.* at A12). The court of appeals held, however, that the district court had erred as a matter of law in concluding that "such 'partial' settlement motives on the part of the EEOC are not legitimate" (*id.* at A12).[2] The court stated (*id.* at A13):

> [T]he EEOC may issue an administrative subpoena for information relevant and necessary to a determination of reasonable cause even though the subpoena may also provide additional incentive for the respondent to

---

[2] The court of appeals stated that a subpoena solely intended to coerce a settlement would not have a legitimate purpose, but the court concluded that this was not such a case (Pet. App. A13-A14).

settle the charge. Otherwise in practice, the EEOC could never seek judicial enforcement of an investigatory subpoena prior to a reasonable cause determination, at which time no further information would be needed, without totally abandoning its role in achieving an early negotiated settlement between the parties.

Petitioner's application for stay of enforcement was subsequently denied, and it thereafter fully complied with the subpoena.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decisions of this Court or any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioner mischaracterizes (Pet. 6) the holding of the Eighth Circuit in this case as one adopting "the extremely narrow view that only a showing of unadulterated bad faith on the part of the agency is ground for declining to enforce [an agency subpoena]." On the contrary, the court of appeals expressly followed the guidelines established by this Court in *United States* v. *Powell*, 379 U.S. 48 (1964), and *United States* v. *LaSalle National Bank*, 437 U.S. 298, 316-317 (1978), for evaluating petitioner's challenge to the subpoena on the ground that the EEOC had proceeded in bad faith. After holding that the underlying charge and notice met applicable statutory and regulatory requirements,[3] the court of appeals turned to the district court's finding that the Commission's investigation was motivated in part by an intent to settle the charge. The court held that

---

[3]Petitioner has not contested this holding in its petition. There is accordingly no reason to postpone disposition of the petition pending the Court's decision in *EEOC* v. *Shell Oil Co.*, No. 82-825, (argued Oct. 31, 1983), which in any event involves a Commissioner's charge rather than the type of charge that initiated this case.

this finding, which was not clearly erroneous, did not establish an illegitimate purpose sufficient to deny enforcement of the subpoena under *Powell* and *LaSalle National Bank*.

The decision of the court of appeals is correct. Voluntary settlements are the "preferred means" of resolving Title VII claims. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Achieving such settlements is one of the primary functions of the Commission. *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 367-368 (1977). Because it is not necessary for the EEOC to find reasonable cause prior to beginning the settlement process (*EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 595 n.5 (1981)), the district court erred in holding that the Commission's subpoena was tainted by its early settlement efforts. As the court of appeals recognized (Pet. App. A13), the practical effect of that ruling would be that "the EEOC could never seek judicial enforcement of an investigatory subpoena prior to a reasonable cause determination, at which time no further information would be needed, without totally abandoning its role in achieving an early negotiated settlement between the parties." This result would clearly be contrary to Congress's intent that employment discrimination charges be speedily and voluntarily resolved.

Petitioner suggests (Pet. 5, 9) that the court of appeals should not have ordered enforcement of the subpoena in the face of the district court's findings in its written order awarding attorney's fees that the action was " ' frivolous, unreasonable, and without foundation, even though not brought in subjective bad faith' " (Pet. App. A-39, quoting *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978)). However, as the court of appeals recognized (Pet. App. A14 n.8), the district court's determination was based on its prior erroneous legal conclusions that the charge was invalid and that the Commission's motives to settle were improper.

Taking the findings in the attorney's fees orders taken out of context, petitioner suggests (see Pet. 9) that the Commission should not be allowed to proceed with its investigation because the charge is groundless. However, neither the Commission nor the courts can determine whether a charge has merit until there has been an investigation of the facts.[4]

Inasmuch as the purpose of the Commission's investigation is to determine whether reasonable cause exists to credit the charge (42 U.S.C. 2000e-5(b)), the courts have uniformly held that "[r]easonable cause for finding a Title VII violation need not be established before an administrative subpoena may be validly issued." *EEOC* v. *Chrysler Corp.*, 567 F.2d 754, 755 (8th Cir. 1977). Accord, *EEOC* v. *K-Mart Corp.*, 694 F.2d 1055, 1066 (6th Cir. 1982); *EEOC* v. *University of New Mexico*, 504 F.2d 1296, 1303 (10th Cir. 1974); *Graniteville Co. (Sibley Division)* v. *EEOC*, 438 F.2d 32, 36 (4th Cir. 1971). See also *United States* v. *Powell*, 379 U.S. at 57.[5] To the extent that petitioner claims

---

[4]Contrary to petitioner's assertion that the Commission "knew that the * * * charge had no merit" (Pet. 9), this was merely the preliminary, personal view of the investigator (see page 3, note 1, *supra*.) As the court of appeals recognized (Pet. App. A15), the investigator's "response * * * was based on incomplete facts primarily because the company had from the start ignored EEOC requests for information going to the merits of the charge."

[5]Petitioner's argument is premised on *SEC* v. *Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118 (3d Cir. 1981), in which the allegations of bad faith (improper influence by a United States Senator) were of an entirely different nature from those here. Furthermore, as the court of appeals noted (Pet. App. A11 n.6), the suggestion in *Wheeling-Pittsburgh* that there should be an agency finding of the likelihood of a violation is particularly inappropriate in the EEOC context, where the investigation itself leads only to a reasonable cause determination and possible conciliation efforts.

The other cases cited by petitioner in an attempt to demonstrate a conflict in the circuits (Pet. 7-8) are wholly inapposite and merely apply the standards of *Powell* and its progeny in a variety of contexts, including procedural and technical objections to subpoenas (*United States* v.

that the district courts should "have discretion to deny enforcement if the agency is found to be proceeding groundlessly" (Pet. 10), petitioner seeks to "place the cart before the horse" and "substitute a different driver for the one appointed by Congress" (*Graniteville Co. (Sibley Division)* v. *EEOC*, 438 F.2d at 36).

2. Because petitioner has now complied fully with the subpoena, the question presented in the petition is now moot, except for its possible collateral consequences on the court of appeals' reversal of petitioner's award of some $9,000 in attorney's fees. That reversal, however, is not even mentioned in the petition and could well stand even if petitioner were otherwise to prevail (especially in light of the fact that the Commission's contentions in this litigation were upheld on the merits by the court of appeals).

Exxon Corp., 628 F.2d 70, 76 (D.C. Cir. 1980); *Casey* v. *FTC*, 578 F.2d 793, 796 (9th Cir. 1978); *FTC* v. *Atlantic Richfield Co.*, 567 F.2d 96 (D.C. Cir. 1977); *United States* v. *Tobins*, 512 F. Supp. 308 (D.C. Mass. 1981)); challenges based on the motives of an informer (*United States* v. *Cortese*, 614 F.2d 914 (3d Cir. 1980)); and pre-enforcement requests for discovery (*United States* v. *Church of Scientology*, 520 F.2d 818 (9th Cir. 1975); *United States* v. *Fensterwald*, 553 F.2d 231 (D.C. Cir. 1977); *United States* v. *Salter*, 432 F.2d 697 (1st Cir. 1970)). None of the cases involved either the EEOC or an issue regarding the propriety of settlement efforts. Cf. *In re EEOC*, 709 F.2d 392, 397-401 (5th Cir. 1983) (holding that IRS summons enforcement case law should not apply to Title VII subpoena enforcement actions and that an employer challenging an EEOC subpoena has the heavy burden of showing administrative abuse).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

DAVID L. SLATE
General Counsel
Equal Employment Opportunity Commission

DECEMBER 1983

DOJ-1983-12